No. 439

Supreme Court of the United States

OCTOBER TERM, 1958

JACKSON D. MAGENAU, ADMINISTRATOR OF THE ESTATE OF NORMAN ORMSBEE, JR., DECEASED, *Petitioner,*

v.

~~AETNA FREIGHT LINES, INC., *Respondent.*~~

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONER

HARRY L. SHNIDERMAN,
701 Union Trust Bldg.
Washington 5, D. C.
M. FLETCHER GORNALL, JR.,
WILLIAM W. KNOX,
Erie, Pennsylvania
Attorneys for Petitioner

COVINGTON & BURLING,
Of Counsel

NOVEMBER, 1958.

Supreme Court of the United States

OCTOBER TERM, 1958

No. 439

JACKSON D. MAGENAU, ADMINISTRATOR OF THE ESTATE OF NORMAN ORMSBEE, JR., DECEASED, *Petitioner*,

v.

AETNA FREIGHT LINES, INC., *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONER

I

In order to focus on the essentials, we believe it is necessary to state the key points that are not controverted by respondent's Brief in Opposition:

1. Respondent does not deny that under Pennsylvania practice the applicability of the Workmen's Compensation Act is reserved to the court. The applicability of the Act depends upon the factual determination of whether Ormsbee was an "employee" who was employed in the "regular course of the business" of the respondent.

2. Respondent does not contest that the Federal District Court in the instant case so viewed the Pennsyl-

vania law. The trial judge made it abundantly clear that he proposed to reserve the issue of whether petitioner's decedent was an employee *within the meaning of the Workmen's Compensation Act* for decision by the court. The experienced trial judge stated to counsel before submitting the key interrogatory to the jury:

> "[Interrogatory] Number 1 I think is directed at one of the issues here. I have said, you see, you notice there *I refrain from saying just what his status is. I don't think it is necessary to have the jury find whether he was employed or not;* I think that is a question for the law." (R. 169a) [Emphasis supplied.]

3. Respondent never asserts that the jury was asked to find whether petitioner's decendent was engaged in the "regular course of the business" of the respondent. Indeed, respondent cannot maintain that either this statutory language, or any equivalent language, was ever presented, at its request or otherwise, to the hearing of the jury. Certainly if respondent wanted the *jury* to determine the factual question of the applicability of the Workmen's Compensation Act, so as to defeat the petitioner's cause of action, it would have asked for instructions on the meaning of "regular course of the business." That concept, as we have seen, is confined to an "ordinary" or "normal" function, and does not include all business activities engaged in by a corporation. The fact of the matter is that the respondent wanted the *court* to decide the question, and not the jury.

4. Respondent makes no claim that any further instruction to the jury was sought after its Request No. 7 for a binding instruction on the applicability of the Workmen's Compensation Act was refused. (See Peti-

tion, pp. 9, 21.) While respondent consistently endeavored at all times thereafter to have petitioner's cause of action dismissed on the ground that the Workmen's Compensation Act provided the exclusive remedy, respondent made no further effort to have the jury instructed so that the latter, and not the court, could decide the issue. Indeed in its Brief in Opposition respondent is so interested in detaching itself from any participation in the trial that it even fails to note that it made Request No. 7 specifically addressed to the Workmen's Compensation issue. Yet the failure to give the charge was relied on by respondent in seeking a new trial. (R. 203a).

II

It is at least clear that respondent is not challenging any of the foregoing points. The key to respondent's Brief in Opposition appears at p. 13, when it states:

> "The Court [of Appeals] accepted the jury's determination. The jury, not the Court of Appeals, determined Ormsbee's status."

The fallacy of this approach can best be seen by asking the question: What was the jury's determination that the Court of Appeals accepted?

As we have seen, the jury never considered the question of whether Ormsbee was an employee in the "regular course of the business" of the respondent. That was one of the key tests for the applicability of the Workmen's Compensation Act, but the jury was not asked to consider it. Nor did the jury consider whether Ormsbee, who was engaged during an emergency, was the employee of Fidler or Schroyer, rather than respondent. In neither of these situations would the Workmen's Compensation Act have barred recovery

against respondent; moreover, Ormsbee would not have been a trespasser. Through Interrogatory No. 1, the jury was merely being asked to determine whether Ormsbee was a trespasser, or whether he had a legitimate reason in an emergency for being on the truck. As the trial court stated:

> "Although at pretrial the status of decedent's relationship with defendant was raised and discussed, the interrogatory to the jury was not so phrased as to require the jury to determine whether decedent was an employee of Aetna." (R. 210a).

And certainly it was not so phrased as to require a determination as to whether Ormsbee was an employee of respondent in the regular course of its business.

Respondent, at p. 5, erroneously states:

> "There was no middle ground. If Petitioner's decedent were not a mere 'rider' (therefore a trespasser as to Respondent), he had to be on the truck as an emergency employee of Respondent."

Ormsbee could indeed have been an emergency employee of respondent, but still not engaged in the "regular course of the business" of the respondent. And, as has been shown, Ormsbee could have been on the truck as an agent or employee of someone other than respondent. But if respondent means to imply at this late date that an "emergency employee", and an employee in the "regular course" of respondent's business, are synonymous terms, this is directly contrary to Pennsylvania law, and not supported by the Court of Appeals in the instant case. *Vescio* v. *Pennsylvania Electric Co.*, 336 Pa. 502, 9 A.2d 546 (1939).

In short, the trial judge, who was in doubt as to whether or not Ormsbee was a trespasser, obtained by

Interrogatory No. 1 a specific answer from the jury on this question. Since respondent did not seek a jury answer with respect to its defense under the Workmen's Compensation Act, which it raised as early as pretrial, no jury determination of this question was made. And a jury verdict for petitioner cannot be upset on the basis of this defense without now depriving petitioner of its right to a jury decision.

When respondent, at p. 13 of its Brief, asserts that "the Court [of Appeals] accepted the jury's determination", it must be appreciated that the *jury* determination which the Court accepted was that petitioner's decedent was not a trespasser. At that point the Court of Appeals considered respondent's defense that the Workmen's Compensation Act applied. *The Court of Appeals fully realized that this question had not been submitted to the jury,* but specifically relying upon SKINNER, a secondary treatise on the Pennsylvania law, concluded that it was authorized to decide the question under state practice. Indeed, if as respondent now asserts, the Court of Appeals was merely accepting a jury finding, why did it find it necessary to rely on SKINNER?

It is not necessary for petitioner to challenge the inference then drawn by the Court of Appeals that Ormsbee was engaged in the regular course of the business of the respondent, namely, transportation of goods by truck, or he had no business being on the truck at all. While that conclusion is erroneous on its face, the point is that this inference from the evidence is one that should have been considered by the jury based on a proper instruction. And the further point is that respondent, although relying upon this defense, did not seek the necessary jury determination to permit it to

prevail under *Byrd* v. *Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525.

Since respondent obviously realizes that there is a gap between any jury finding of emergency employment, and a finding that Ormsbee was engaged in the regular course of respondent's business, it lamely asserts, at p. 13, that somehow this issue did not get to the jury because there was no dispute in the record on the point, and in fact that the point was mysteriously conceded. No matter how the record is read, petitioner made no such concession, either in oral argument or otherwise, and this is the first time that such a contention has even been advanced.

In fact, Ormsbee was engaged under most unusual circumstances to perform a most unusual role, and every inference is that his employment was both casual and other than in the "normal" or "ordinary" course of respondent's business. At the very least, a jury could have so found. *Byrd* v. *Blue Ridge Rural Electric Cooperative, Inc.*, *supra*, reserves that finding in a federal court to the jury. It is too late now for respondent to seek a jury determination, and it is contrary to *Byrd* to substitute a finding by the Court of Appeals.

CONCLUSION

For the reasons stated here and in the Petition for Certiorari, petitioner prays that the petition for a writ of certiorari be granted.

Respectfully submitted,

HARRY L. SHNIDERMAN,
701 Union Trust Bldg.,
Washington 5, D.C.
M. FLETCHER GORNALL, JR.,
WILLIAM W. KNOX,
Erie, Pennsylvania
Attorneys for Petitioner.

COVINGTON & BURLING,
Of Counsel

NOVEMBER, 1958.

(2834-0)